95-1442

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

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Barney K. Huang,
Petitioner,

v.

Becky R. French, Thomas J. Ziko, Bruce R. Poulton,
Board of Governors of the University of North Carolina,
North Carolina State University,
Respondents.

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On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 91-393-CIV-5-BR

BARNEY K. HUANG, Plaintiff, v. BECKY R. FRENCH, THOMAS J. ZIKO, BRUCE R. POULTON, TROY A. DOBY, JOHN N. GREGG, THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA AND ITS CONSTITUENT INSTITUTION, NORTH CAROLINA STATE UNIVERSITY, Defendants.	)	ORDER

This matter is before the court on defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion has been fully briefed, and the court is now ready to rule.

I. Facts

Plaintiff Barney Huang instituted this action on 21 June 1991 challenging his dismissal as a tenured professor from North Carolina

State University ("NCSU").[1] In his complaint, plaintiff asserts: (1) an equal protection claim under 42 U.S.C. § 1983 and under Article I, Section 19 of the North Carolina Constitution; (2) a discrimination and retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and 3(a) ("Title VII"); (3) a due process claim under both the Fourteenth Amendment and Article I, Sections 1 and 19 of the North Carolina Constitution; (4) a violation of free speech claim under the First Amendment; and (5) an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq* ("ADEA"). The facts relevant to this motion, and taken in the light most favorable to plaintiff, are as follows:

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[1]Plaintiff also filed a companion case in the General Court of Justice of the Superior Court Division, Wake County, North Carolina challenging his dismissal, via North Carolina's Administrative Procedure Act, asserting claims of breach of contract and intentional infliction of emotional distress. The trial court granted summary judgment in favor of plaintiff on his breach of contract claim, and granted summary judgment against plaintiff on the emotional distress claim. However, on appeal, the North Carolina Court of Appeals vacated the trial court's summary judgment, holding that plaintiff's complaint should have been dismissed *in toto* for failure to exhaust administrative remedies. *See Huang v. North Carolina State University*, 421 S.E.2d 812 (N.C. App. 1992).

Before his termination of employment in February 1989, plaintiff was a tenured professor at NCSU. Plaintiff had been a member of the NCSU faculty since 1963, beginning his employment as an assistant professor in the Biological and Agricultural Engineering Department ("BAE") of NCSU. In 1967, plaintiff was granted permanent tenure, made a full member of the graduate school, and promoted to associate professor. Plaintiff was then promoted to full professor in 1973. Being a naturalized citizen from Taiwan, plaintiff was the only minority professor on the BAE faculty.

As a full professor, plaintiff's research duties included extensive work in the areas of design and perfection of mechanical and other devices to assist in agricultural productivity wherein he has achieved some notoriety. While a tenured member of the faculty, plaintiff began to express his concerns over perceived salary disparities between himself and other, non-minority BAE faculty members. However, no action was taken as a result of plaintiff's complaints.

In 1986, plaintiff was involuntarily transferred from the BAE department to the Division of University Studies ("DUS") department of NCSU.[2] While in the DUS, plaintiff did not teach a single course. Rather, his duties primarily included research and scholarly publication. Plaintiff remained in the DUS until his ultimate dismissal from the NCSU faculty.

During the year 1988, events took a turn for the worse for plaintiff. In June of that year, plaintiff was charged in the General Court of Justice of the Superior Court Division, Wake County, North Carolina with attempted second-degree rape and assault on a female by Grace Li Wang. Subsequently, a probable cause hearing was held on 14 July 1988 at which defendants Poulton, French, and Ziko were present. Upon a finding of probable cause, plaintiff was then bound

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[2]This transfer was the subject of a previous, unsuccessful lawsuit filed by plaintiff wherein claims of discrimination, due process, and First Amendment violations were brought against NCSU and certain university officials. This litigation surrounding this transfer ended with the Fourth Circuit Court of Appeals' decision, *Huang v. Board of Governors of University of N.C.*, 902 F.2d 1134 (4th Cir. 1990), where it was held, *inter alia*, that plaintiff's inter-departmental transfer did not involve an infringement of a constitutionally protected property interest.

over to superior court for trial. As a result of this hearing, defendant Poulton (the former Chancellor of NCSU) immediately issued, on the same date, a notice of intent to discharge letter to plaintiff and suspended him from his duties. As grounds for the dismissal, defendant Poulton indicated that plaintiff had engaged in conduct of such a nature so as to render him unfit to continue as a member of the faculty. In his letter, Poulton cited not only conduct involving Ms. Wang, but also other incidents which occurred sporadically while plaintiff was in the BAE -- namely, physical and/or verbal assaults: (1) with Dr. Dallas Chen in 1974; (2) with Mr. Henry Y. R. Chen in 1980; (3) with Dr. Francis Hassler in April 1980; and (4) with Dr. James W. Dickens in 1985.

In light of this letter, plaintiff requested a hearing regarding the nature and validity of his dismissal pursuant to the remedial provisions of The Code of the Board of Governors of the University of North Carolina ("the Code"). These proceedings were stayed,

however, pending a trial on plaintiff's criminal charges.[3] Eventually, a dismissal hearing was conducted in December 1988 and January 1989 before a Faculty Hearing Committee ("FHC") comprised of 5 (five) faculty members of NCSU. Plaintiff was represented by counsel at the hearing. After hearing twenty-two (22) hours of evidence, the FHC determined on 1 February 1989, by a vote of 3 to 2, that plaintiff was guilty of misconduct and recommended that he be removed from the NCSU faculty. Former Chancellor Poulton adopted these findings and followed the FHC's recommendation that plaintiff be dismissed from the NCSU faculty. Consequently, plaintiff was discharged from his professorial duties on 7 February 1989.

Again, pursuant to the Code, plaintiff pursued his course of

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[3]Plaintiff was ultimately brought to trial, and a jury acquitted him of attempted second-degree rape but found him guilty of assault on a female. Plaintiff appealed his conviction. On appeal, the North Carolina Court of Appeals overturned his conviction and granted him a new trial based on an improper allowance of expert testimony by the trial court. *See State v. Huang*, 394 S.E.2d 279 (N.C. App.), *review den.*, 399 S.E.2d 127 (N.C. 1990). The court is unaware of the current status of these criminal proceedings.

appeal. Plaintiff first appealed his dismissal to defendant NCSU Board of Trustees ("Board of Trustees") which affirmed Poulton's decision. Thereafter, plaintiff appealed to the University of North Carolina Board of Governors ("Board of Governors") to review the dismissal proceedings and decision for procedural errors. At this stage of appeal, plaintiff asserted to the Board of Governors that there were alterations and deletions in the evidentiary record before the FHC, and thus alleged that a procedural error was committed.[4]

To support his contention, plaintiff submitted an document entitled "Exhibit 1", which was apparently an accurate copy of a notebook that contained some of plaintiff's evidence sought to be admitted at the FHC hearing. The FHC did not admit this exhibit as formal evidence, but rather agreed to accept the copies of the notebook for the individual faculty members to subjectively review

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[4]Also regarding this claim, plaintiff filed complaints against defendants Ziko and French with the North Carolina State Bar contending that they had intentionally altered or deleted portions of the evidentiary record before the FHC. After an investigation, these charges were summarily dismissed as without merit by the State Bar.

and consider as they thought appropriate. However, the notebook was mistakenly copied as part of the official record and was subsequently sent to the Board of Trustees on appeal. Plaintiff somehow discovered this, and also became aware that there were discrepancies between the copy (and/or copies) of the notebook originally submitted to the FHC and the one which was delivered to the Board of Trustees for review.

Upon realizing that there may be some merit to plaintiff's contention, the Board of Governors remanded the case to the Board of Trustees to determine: (1) whether there were any material errors made in the evidentiary record, and if so, to correct them; and (2) whether the Board of Trustees would have ruled differently if an accurate record were before it. If the Board of Trustees answered these issues affirmatively, then they were to reconsider their previous decision affirming the dismissal of plaintiff.

On remand, the Board of Trustees appointed defendant Doby to conduct the review in accordance with the Board of Governors'

instructions. It was then determined that there were no material errors in the record which could have affected the Board of Trustees' ruling on plaintiff's dismissal. This decision was subsequently adopted by the Board of Trustees in whole, and the case was returned to the Board of Governors. On review, the Board of Governors then affirmed the Board of Trustees' ruling regarding plaintiff's dismissal.

Plaintiff then filed with the Equal Employment Opportunity Commission ("EEOC") two separate EEOC and ADEA charges on 2 May 1990 and 8 August 1990 respectively. *See* Def.'s Br., Exs. 12, 13, 15, 16. As to the 2 May 1990 charge, plaintiff alleged discrimination and retaliation based on the alleged alterations and deletions to the administrative record. After investigation and review, the EEOC determined that these allegations did not establish a statutory violation. Regarding the 8 August 1990 charge, plaintiff alleged discrimination based on race, national origin, age, and retaliation surrounding his dismissal from NCSU as a tenured professor. EEOC also investigated these charges and found, in its

determination, that the charges were filed more than 180 days after the alleged violation. As a result, EEOC failed to initiate enforcement proceedings on behalf of plaintiff.

From these events, plaintiff filed this action seeking: (1) to have this court enter a declaratory judgment that defendants' conduct violates plaintiff's constitutional and statutory rights; (2) a preliminary injunction enjoining defendants' allegedly unlawful employment practices; and (3) to be reinstated as a full, tenured professor on the NCSU faculty. Plaintiff also seeks back pay and other lost employment benefits, attorney's fees, consequential damages, and punitive damages.

Defendants now make this motion for summary judgment to have all of plaintiff's claims dismissed.

II. Discussion

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue any material fact and that the moving party is entitled to judgment as to a matter of law." Fed. R. Civ. P. 56(c). This rule "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

A. Plaintiff's First Amendment and ADEA claims and his inclusion of Troy A. Doby and John N. Gregg as defendants

At the outset, the court recognizes that plaintiff does not dispute that summary judgment is warranted as to plaintiff's First Amendment and ADEA claims. *See* Pl.'s Br. at 1. In addition, plaintiff concedes that there are no genuine issues of material fact regarding defendants Doby and Gregg, and thus plaintiff acknowledges that summary judgment in favor of these defendants is appropriate. *Id.* In view of this, the court hereby GRANTS summary judgment dismissing plaintiff's First Amendment and ADEA claims

and defendants Doby and Gregg.

B. Plaintiff's Title VII discrimination claims

Plaintiff filed EEOC claims asserting two Title VII discrimination violations: (1) defendants forwarded a falsified appellate record to the Board of Trustees and to the Board of Governors; and, (2) discriminatory discharge. Defendants argue that these claims should be dismissed because they are barred by the 180-day statute of limitations set forth in 42 U.S.C. § 2000e-5. In support of their argument, defendants maintain that the limitations period begins to run when the alleged unlawful action occurred, not when plaintiff discovers that he has a cause of action, nor when defendants acknowledge the alleged action.

Regarding the forwarding of an alleged false appellate record, defendants contend that because more than 180 days had elapsed between the alleged unlawful action -- the submission of an alleged

false record to the Board of Trustees -- in April 1989[5] and the 2 May 1990 filing of the discrimination charge with the EEOC, plaintiff's discriminatory discharge claim should likewise be considered untimely filed.

On the other hand, plaintiff counter-argues that plaintiff's falsified record charge is not time-barred because the submission of the alleged falsified record continued until the final employment decision was made, i.e., the date the appeal was finalized by the Board of Governors on 9 February 1990. Since the interim between 9 February 1990 and 2 May 1990 is well within 180 days, so the argument goes, plaintiff's falsified record claim should be deemed timely filed.

As a corollary, plaintiff also contends that, even if this court

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[5]This court is aware that even if it adopted a "discovery rule" approach, a point which will be discussed *infra*, regarding plaintiff's falsified record claim, his claim would be time-barred just the same. By his own admission, plaintiff discovered, no later than 16 October 1989, that certain discrepancies existed in theoriginal FHC evidentiary record and the appellate record submitted to the Boardof Trustees. *See* Pl.'s Br. at 8; (Huang Aff. at 7); (Huang Aff., Ex. 23).

agreed with defendants' position regarding a date to begin the running of the limitations period, the principle of equitable estoppel should apply in this case nonetheless to toll the 180-day period from running. In support of his argument, plaintiff alleges that defendants deliberately concealed the falsified record information from plaintiff until 7 November 1989, the date when plaintiff learned that defendant Ziko admitted the record was inaccurate. Plaintiff therefore maintains that defendants should be equitably estopped from asserting that the April 1989 date began the running of the limitations period. The court disagrees with both of plaintiff's arguments.

First turning to plaintiff's equitable tolling or estoppel argument, the court recognizes that equitable tolling applies where defendants have wrongfully deceived or misled plaintiff in order to conceal the existence of a cause of action. *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). To prevail on this theory, plaintiff must demonstrate that defendants attempted to mislead him and that plaintiff reasonably relied on the misrepresentation by

neglecting to file a timely charge. *Id.* Similarly, the doctrine of equitable estoppel requires that plaintiff show that defendants engaged in intentional misconduct to cause plaintiff to miss the filing deadline. *Id.*

Given this, plaintiff has not produced one shred of evidence to suggest that any of the actions of defendants were either designed to mislead plaintiff in order to conceal the existence of a cause of action or to cause him to miss the filing deadline. To support the invocation of this doctrine, all plaintiff asserts are the mere allegations that defendants "concealed this information from the Plaintiff until on or about November 7, 1989, when the Plaintiff learned that Defendant Ziko admitted the record was inaccurate" and, that plaintiff "did not have the assistance of lawyers during the EEOC process". *See* Pl.'s Br. at 14. These statements, without any evidence to corroborate them, are nothing more than unsupported conclusions. Of surprising importance, plaintiff, by his own admission, did not file his EEOC claims until 2 May 1990 precisely because his attorney

advised him to file his EEOC charges before 6 May 1990. (Huang Aff., p. 7.) In view of the above, the court therefore finds that plaintiff is not entitled to assert the doctrine of equitable estoppel or equitable tolling as to either of his Title VII claims.

Considering the statute of limitations issue on its merits, it is well settled that an aggrieved employee must file a timely charge with the EEOC as a prerequisite to filing an employment discrimination action pursuant to Title VII. *United Air Lines, Inc. v. Evans*, 97 S. Ct. 1885 (1977); *EEOC v. Hansa Products, Inc.*, 844 F.2d 191, 192 (4th Cir. 1988). Further, Title VII provides that a claim must be filed within 180 days "after the alleged discriminatory employment practice occurred." 42 U.S.C. § 2000e-5(e) (emphasis added); *see Delaware State College v. Ricks*, 101 S. Ct. 498 (1980). The 180-day limitations period runs from the date of the "alleged unlawful employment practice." *Id.* Thus, the court's first task, in determining whether a Title VII statute of limitations violation has occurred, is to precisely identify the alleged unlawful employment practice.

Hamilton v. 1st Source Bank, 928 F.2d 86, 88 (4th Cir. 1990).

To delineate the standards with lower courts must use in classifying an "alleged unlawful employment practice", the Supreme Court has instructed that the "proper focus is upon the time of the [alleged] discriminatory acts, not upon the time at which the consequences become most painful." *Ricks*, 101 S. Ct. at 504. The Fourth Circuit has further elucidated, under a similar analysis of an ADEA time limitations question, that review of an ADEA, like a Title VII, limitations issue is a matter of "simple statutory construction," stating that:

> To the extent that notice enters the analysis, it is notice of the employer's actions, not the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period. This circuit has faithfully followed that criterion in discriminatory discharge cases, wherein we have counted the 180 days from either the time of discharge or from the moment the employee received advance notice of the pending discharge.

Hamilton, 928 F.2d at 87-89. Therefore, the Fourth Circuit rejected the discovery rule approach (i.e., when an employee discovers or

should have discovered a Title VII or ADEA violation), and held that the 180-day period for filing claims begins to run from the time of the alleged discriminatory act. *Id.* at 90.

In this case, it is clear that, as to plaintiff's first Title VII discrimination claim, the alleged discriminatory act occurred in April 1989, the date when the false record was submitted to the Board of Trustees. Plaintiff's supposed "continuing violation" argument must fail because the court is aware that a continuing violation is distinguishable from a violation arising simply from the failure to correct a past discrimination. A "continuing violation" encompasses a continuing employment practice which is discriminatory, not a continuing alleged failure to correct a past discrimination. *Ricks*, 101 S. Ct. at 504; *Polsby v. Chase*, 970 F.2d 1360, 1365 n.3 (4th Cir. 1992). Plaintiff's argument appears to be specifically the latter: a possible violation arose from the Board of Governors' failure to correct a past discrimination -- the original submission of the alleged falsified record. As such, plaintiff's "continuing violation" argument

must be rejected. Therefore, the court finds that from the straightforward rules set forth above, plaintiff had 180 days from April 1989 to file his claim with EEOC. This he did not do, and his falsified record claim is thus time-barred.

Next, considering plaintiff's second Title VII claim of discriminatory discharge, defendants contend that this claim should also be deemed time-barred. Defendants argue that plaintiff's time for filing charges surrounding this claim began to run, not from the time his employment actually ended, but from the time he received the notice of the intent to discharge him in July 1988. Because the time between plaintiff's receipt of the intent to discharge letter in July 1998 and his filing of charges with EEOC on 9 August 1990 exceeds well over 180 days, defendants maintain that this claim is time-barred.

In response, plaintiff asserts that his claim is not time-barred in that his cause of action arose on 14 February 1990, the date when the Board of Governors ultimately affirmed plaintiff's dismissal. To bolster this assertion, plaintiff once again alleges a continuing

violation, explaining that the occurrence of the discriminatory acts of defendants was ongoing because there was a concerted effort to rid NCSU of plaintiff which culminated with the Board of Governors' final affirmance of plaintiff's dismissal. Plaintiff also contends that since he holds a property right as a full tenured professor, only the Board of Governors has the ultimate authority to take his property right from him. As a consequence, plaintiff argues, every action during the appeal process initiated by a tenured professor is an attempt to influence a future decision. Plaintiff therefore concludes that his discriminatory discharge claim was timely filed. The court finds this argument unpersuasive.

As already discussed above, plaintiff had 180 days, running from the date of the occurrence of the alleged discriminatory act, within which to file his claim with EEOC. 42 U.S.C. § 2000e-5(e) (emphasis added); *Ricks*, 101 S. Ct. at 504-05. The Fourth Circuit has explicitly held that in discriminatory discharge cases, the 180-day deadline runs from either the time of discharge or from the moment

the employee received advance notice of the pending discharge. *Hamilton*, 928 F.2d at 87-89.

In this case, plaintiff was formally discharged by defendant Poulton, upon recommendation by the FHC, on 7 February 1989. Plaintiff received advance notice of the pending discharge via Poulton's letter in July 1988. Furthermore, it is undisputed that EEOC charges were not filed by plaintiff, regarding this discriminatory discharge claim, until 9 August 1990. Either of the dates, 7 February 1989 or July 1988, is well outside the 180-day time period for filing such claims.

Plaintiff's "continuing violation" argument is without merit because the appeal of the Board of Trustees' decision does not suggest in the least that the original discharge decision by defendant Poulton was in any respect tentative. As stated by the Supreme Court, "[t]he grievance procedure, by its nature, is a remedy for a prior decision." *Ricks*, 101 S. Ct. at 506. In light of this, the court finds that the Board of Governors' final affirmance of plaintiff's dismissal on 14 February

1990 does not constitute an independent discriminatory act giving rise to an invocation of the continuing violation theory in this case. *See Id.*, 101 S. Ct. at 504; *Chase*, 970 F.2d at 1365 n.3. Rather, plaintiff's last appeal to the Board of Governors is more aptly characterized as an attempt to correct an alleged past discrimination. Because plaintiff failed to file his Title VII claim of discriminatory discharge within 180 days from either the receipt of Poulton's intent to discharge letter in July 1988 or his formal discharge by Poulton on 7 February 1989, the court therefore concludes that this claim is time-barred.

C. Plaintiff's Other Discrimination Claims

Plaintiff also alleges that defendants discriminated against him by dismissing him from the NCSU faculty because of his national origin -- Asian-American. In addition, plaintiff also makes discrimination claims pertaining to altering the FHC evidentiary record and suspending his pay. These claims are based on 42 U.S.C. § 1981 and 42 U.S.C. § 1983 for violation of plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment.

Defendant argues that these remaining discrimination claims should be dismissed based on plaintiff's failure to produce any evidence of discriminatory animus by any defendant in this action. Thus, defendants posit that plaintiff cannot establish a prima facie case of discrimination against the defendants, and his claims should not survive summary judgment. After a review of all materials in the record, the court agrees.

To prevail on a discrimination claim brought under § 1981 or § 1983, plaintiff must show that defendants intentionally discriminated against him because of his national origin or race. *Washington v. Davis*, 96 S. Ct. 2040 (1976). Since plaintiff's claim is really one of disparate treatment, he bears the burden of proving discriminatory motive on the part of defendants. *Int'l Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843 n.15 (1977); *Holder v. Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989). If plaintiff is unable to offer direct proof of discriminatory intent, plaintiff must then prove a prima facie case of discrimination by tendering direct evidence of

discrimination or indirect evidence whose cumulative probative force, apart from the presumption of discrimination announced in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973), would suffice under the controlling standard to support as a reasonable probability the inference that but for plaintiff's national origin he would not have been denied the employment benefit at issue. *Holmes v. Bevilacqua*, 794 F.2d 142 (4th Cir. 1986). The purpose of this prima facie requirement, in the context of a disciplinary decision, is satisfied if plaintiff shows: (1) that he engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin; and, (2) that disciplinary measures enforced against him were more severe than those enforced against the other person. *Moore v. Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir. 1985).

Initially, the court emphasizes the weakness of plaintiff's position. To counter defendants' argument set out above, plaintiff makes only the following single-sentence response in his brief: "[t]he fact that other, white, male faculty members at NCSU were not

dismissed when convicted of crimes gives rise to a genuine issue of material fact with regard to Plaintiff's termination." Pl.'s Br. at 15 (citations omitted). Plaintiff fails to offer the court any evidence, either direct or circumstantial, to support such a bold assertion. Nor does plaintiff engage in any analysis whatsoever regarding the remainder of his discrimination claims which would give rise to a material factual dispute.

Plaintiff has simply failed to show that his assaultive conduct was similar to that of other NCSU faculty members of another race or national origin and that the disciplinary actions taken by defendants were more severe than those enforced against the other faculty member. In view of this, the court finds that there is no evidence of any kind to suggest that defendants have engaged in discrimination in this case, and therefore determines that defendants are entitled to summary judgment in its favor concerning these claims.

D. Plaintiff's Statutory Retaliation Claims

Plaintiff also complains that defendants retaliated against him, in violation of Title VII and potentially 42 U.S.C. § 1981, for filing both EEOC charges and a lawsuit in federal court regarding the controversy over his transfer from BAE to DUS. Defendants contend, in support of their motion for summary judgment, that plaintiff has failed to produce any evidence showing that his discharge from NCSU was the retaliatory product of filing EEOC charges and/or a federal suit. The court agrees.

To prove a retaliatory discharge claim, plaintiff must show by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and, (3) a causal connection existed between the protected activity and the adverse action. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Once plaintiff has established this prima facie case, plaintiff bears the additional burden of showing that the adverse action would not have occurred "but for" the protected conduct. *Id.* at 365-66.

In this case, it cannot be said, in whole or in part, that plaintiff's termination from employment at NCSU in 1988 would not have occurred but for plaintiff's filing of either EEOC charges or suit in federal court in 1986[6] to enforce his rights over his involuntary transfer from BAE to DUS. Quite the contrary, ample evidence exists showing that plaintiff's dismissal was predicated solely on plaintiff's criminal assault charge regarding Ms. Wang and other various episodes of violent behavior exhibited by plaintiff.

In view of this, the court understands that the retaliatory action statutes "[do] not shield employees from normal sanctions from employment." *Id.* This appears to be exactly what happened in this case -- the FHC heard 22 hours of evidence, *inter alia*, surrounding plaintiff's behavior in and around work, plaintiff had an opportunity to rebut this evidence, but ultimately the FHC recommended that plaintiff be discharged because he "[had] been

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[6]Plaintiff's complaint surrounding his involuntary transfer from BAE to DUS was filed in federal court on 26 September 1986.

guilty of misconduct of such a nature as to render him unfit to be a faculty member at North Carolina State University." (Ziko Aff., Ex. 5.) Although plaintiff apparently filed EEOC charges and a suit in federal court over his involuntary transfer, there is simply no evidence before the court causally linking plaintiff's discharge with this protected conduct. On the face of it, defendant Poulton, acting upon recommendation of the FHC, discharged plaintiff for misconduct unbecoming of a NCSU faculty member.

Upon full review of the record, this court is not in a position to second-guess this decision of discharge for this legitimate reason. Section 603 of the Code clearly specifies that a faculty member may be discharged once he has been found to have engaged in misconduct of such a nature as to indicate that he is unfit to continue as a faculty member. The FHC so found in plaintiff's case, and therefore his statutory retaliation claims must be dismissed.

E. Plaintiff's Due Process Claim

In his complaint, plaintiff makes a due process claim alleging

that defendants' employment practices and policies are arbitrary and capricious and are therefore violative of substantive due process under the Fourteenth Amendment. However, regarding this "substantive" due process claim, plaintiff asserts at the outset in his brief that ". . . [p]laintiff's tenured position as a full professor at NCSU is a property right entitled to procedural due process protection. . . . The question then remains as to what process is due." Pl.'s Br. at 15 (citation omitted) (emphasis added). Thus, plaintiff's claim really seems to be a procedural due process one, and the court will analyze his claim from that standpoint.[7]

Summarizing plaintiff's contentions, he is in essence alleging that because the procedures provided for by the Code were not precisely followed in discharging him form the NCSU faculty, he was denied procedural due process. Specifically, plaintiff complains that:

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[7]To the extent that plaintiff's complaints can be construed as a substantive due process claim regarding an alleged violation of the Faculty Handbook procedures, discussed *infra*, the court hereby dismisses the same inasmuch as the Fourth Circuit considered a similar argument concerning plaintiff's involuntary transfer and rejected it. *Huang*, 902 F.2d at 1141.

(1) a portion of the hearing was conducted in his absence; (2) he was not allowed to confront and cross-examine Ms. Wang, whose transcribed trial testimony was used as part of the evidence in the FHC dismissal proceedings; and, (3) a portion of plaintiff's testimony was taken in the absence of one member of the FHC.

As the Fourth Circuit has explained, "[t]o have a property interest subject to procedural due process protection, an individual must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law." *Huang v. Board of Governors of University of N.C.*, 902 F.2d at 1141. The Fourth Circuit went on to find that ". . . Dr. Huang's position as a tenured professor is indisputably a property right entitled to procedural due process protection." *Id.* With this in mind, the process a discharged tenured public employee is due under the Constitution does not need to be an elaborate hearing, but simply one which must be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532,

541-46 (1985). Put simply, all that is needed in cases such as this one is notice of the charges and an opportunity to respond to those charges. *Id.*; *Arnett v. Kennedy*, 416 U.S. 134, 170-71 (1974).

In this case, plaintiff was unquestionably accorded such notice and a full evidentiary hearing to present his side of the story. As previously stated, the FHC convened to hear the charges brought against the plaintiff for misconduct at which a record was made of all events. The University prosecuted its case against plaintiff, and plaintiff responded to those charges by calling witnesses, submitting documentary evidence, and presenting oral argument. Although it is undisputed that plaintiff was not present for a small portion of the hearing, plaintiff had counsel present on his behalf at all stages of the proceeding before the FHC. Plaintiff's attorney had an opportunity to cross-examine witnesses[8] heard in plaintiff's absence, and his attorney did just that. After hearing and reviewing all the evidence

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[8]However, from the affidavits submitted, it appears that just one witness was heard by the FHC in plaintiff's absence -- that of Dallas Chen. (Ziko Aff. II, pp. 4-5.)

in the case, the FHC then voted to recommend that plaintiff be discharged from employment for misconduct.

In light of this, the court acknowledges that the process due when a state-created property right is involved must be determined by reference only to the Constitution. *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990). The Fourth Circuit expounds:

> Alleged violations of due process in the deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures, even when those state-created procedures exceed the amount of process otherwise guaranteed by the Constitution. If state law grants more procedural rights than the Constitution would otherwise require, a state's failure to abide by that law is not a federal due process issue.

Id.

Section 603(1) of the NCSU Faculty Handbook ("Handbook") provides that "[a] faculty member, who is the beneficiary of institutional guarantees of tenure, shall enjoy protection against unjust and arbitrary application of discipline penalties." Additionally,

Section 603(6) requires that each tenured "faculty member shall have the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses, and to examine all documents and other adverse demonstrative evidence."

Plaintiff claims that defendants violated these outlined procedures, as discussed previously, giving rise to a procedural due process claim under the Fourteenth Amendment. Essentially, plaintiff argues that the use of Grace Wang's previously-transcribed testimony at the FHC hearing was constitutionally improper. Plaintiff also complains that a departure of one of the faculty members of the FHC during its proceedings was similarly improper. Based on the binding authority set forth above, the Court disagrees.

Regarding the introduction of Ms. Wang's testimony, it is undisputed that plaintiff, by and through his attorney, did not object to its admission before the FHC. The transcript included both direct and cross-examination conducted at the criminal proceedings against plaintiff. Plaintiff was obviously present during his state criminal

trial, and he had a further opportunity to rebut Ms. Wang's testimony during his testimony before the FHC. As to the absence of one of the FHC faculty members, it is further undisputed that plaintiff, by and through his attorney, did not object to the faculty member's departure from what was apparently a short portion of plaintiff's testimony on the last evening of the hearing.

Upon full review, the court finds that even if some of the Handbook procedures were not followed fully in this case, these errors are nonetheless viewed as of minimal consequence. Plaintiff has not satisfactorily shown how he was prejudiced by these errors, and thus the court considers them harmless. In sum, the court holds that the FHC proceeding was conducted in a fair and impartial manner after careful and deliberate consideration and that the process was not so lacking in reasonableness that notions of fairness were offended. *Huang*, 902 F.2d at 1141. Plaintiff's due process claim is accordingly dismissed.

F. Plaintiff Claim Under the North Carolina Constitution

Because all the federal claims have been dismissed against defendants in this action, the court dismisses without prejudice the remaining pendent state claims plaintiff has asserted under the North Carolina Constitution. In view of this, the court is divested of jurisdiction to entertain these claims, and plaintiff is left to pursue these matters in state court. *See Denton v. Hernandez*, 112 S.Ct. 1728 (1992).

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment is **GRANTED** with respect to all of plaintiff's federal claims. Plaintiff's remaining claims under the North Carolina Constitution are hereby **DISMISSED WITHOUT PREJUDICE** leaving plaintiff to pursue these claims in state court. The court recognizes that defendants have also made a motion to strike a portion of plaintiff's summary judgment response. Because the court has already granted summary judgment in favor of defendants, the remaining motion to strike is **DENIED AS MOOT**. This action is

hereby **DISMISSED**.

This 11 January 1993.

/s/
W. EARL BRITT
United States District Judge

bh/ncsu/sfw